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# The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?

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## Abstract

*The door may be closed (for now) on lifting state immunity for human rights violations on the basis of a jus cogens exception, but there is some hope that the commercial activity and employment contract exceptions to immunity might open up possibilities for relief. Holding states, diplomats and international organizations accountable for human rights abuses that occur in an employment context is the 'new' human rights dilemma. These abuses range from breach of contract to discrimination, harassment and human trafficking. This article examines the dilemma from the perspectives of principle, practice and policy. It proposes a framework for analysing employment disputes involving claims of immunity and identifies trends and variables in the practice of 20 jurisdictions. It also considers whether requiring a prospective waiver of immunity from embassies and organizations may be a best practice model for states to adopt.*

## 1 Introduction: A New Human Rights Dilemma?

A series of recent decisions by international, regional and national courts has rejected the existence of an exception to state immunity for grave human rights violations under customary international law, including torture. For the purposes of this article, I call this the 'old' human rights dilemma. It is 'old' in the sense of being well established and already subject to extensive analysis and commentary.

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In 2012, the International Court of Justice (ICJ) in the *Jurisdictional Immunities* judgment held that ‘under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict’.<sup>1</sup> Italian nationals were barred from suing Germany for compensation for war crimes and crimes against humanity committed during World War II. In early 2014, the Fourth Section of the European Court of Human Rights (ECtHR) held in *Jones v. United Kingdom* that the United Kingdom’s (UK) grant of immunity to Saudi Arabia, and the named officials in civil suits for torture brought by four individuals, did not interfere disproportionately with their right of access to court. The Court treated the ICJ’s *Jurisdictional Immunities* judgment as ‘authoritative’ for the proposition that ‘no *jus cogens* exception to State immunity had yet crystallised’ under customary international law.<sup>2</sup> And in late 2014, the Supreme Court of Canada in *Kazemi v. Iran* endorsed the reasoning in *Jones v. United Kingdom* and *Jurisdictional Immunities*.<sup>3</sup> Seeking justice for the torture and death of his mother in prison in Iran, Stephan Hashemi had sued the Islamic Republic of Iran, Iran’s head of state, the chief public prosecutor of Tehran, and a former deputy chief of intelligence, claiming damages for his mother’s suffering and death and for the emotional and psychological harm that this experience had caused him. His claims were barred by immunity.

This chain of cases, each building on each other, appears to resolve the ‘old’ dilemma for now – there is no human rights exception to state immunity for grave human rights violations under customary international law.<sup>4</sup> However, state immunity is not absolute in the vast majority of jurisdictions. There are exceptions that have been codified in national legislation and international conventions. Most states, with

<sup>1</sup> *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*, Judgment, 3 February 2012, ICJ Reports (2012), para. 91.

<sup>2</sup> ECtHR, *Jones and Others v. United Kingdom*, Appl. nos 34356/06 and 40528/06, Judgment of 14 January 2014, para. 198.

<sup>3</sup> *Kazemi v. Islamic Republic of Iran*, [2014] SCC 62.

<sup>4</sup> Note, however, the extensive practice of US courts in cases brought under the Alien Tort Statute and Torture Victim Protection Act in relation to current and former foreign officials. US courts have held that torture and other grave violations of human rights are not official acts entitled to immunity. *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005). Dodge notes that some of these cases were decided under the Foreign Sovereign Immunities Act, 90 Stat. 2891 (FSIA) before the Supreme Court held in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), that the immunity of foreign officials is governed by federal common law. But he also observes that *Samantar* noted that the distinction between official and non-official acts ‘may well be correct as a matter of common-law principles’ (at 2291, n. 17). The US practice has to date been based on specific legislation and mainly related to state officials rather than the state itself; see, however, the pending bill for Justice Against Sponsors of Terrorism Act which amends the federal judicial code to narrow the scope of state immunity by authorizing US courts to hear cases involving claims against a foreign state for injuries, death, or damages that occur inside the US as a result of a tort, including an act of terrorism, committed anywhere by a foreign state or official. The US approach has not been followed by other jurisdictions, save for Canada, which has introduced a tort exception to immunity of ‘State sponsors of terrorism’. State Immunity Act, RSC 1985, c. S-18, s. 6 (Canada SIA). W.S. Dodge, Is Torture an “Official Act”? Reflections on *Jones v. United Kingdom*, 15 January 2014, available at <http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/> (last visited 1 November 2015).

the major exception of China,<sup>5</sup> generally accept that they are not immune for private law and commercial transactions. As Harold Koh has asked, ‘if contract, then why not torture?’<sup>6</sup>

Employment is an interesting area because it is a commercial relationship in which abuses can and do occur. It is where the contract and the torture (or other abuse) coincide. Numerous human rights may be engaged, including freedom from discrimination, the right of access to court, the right to health, freedom of movement and freedom of association. In September 2015, for example, two female Nepali domestic servants employed by the first secretary of the Saudi embassy in India alleged that they had been held against their will, denied food and water, beaten and repeatedly raped by up to seven men, including the diplomat.<sup>7</sup> The diplomat left India a few days later, and, despite public outrage, there is no prospect of a trial in either country.<sup>8</sup>

Embassies often employ migrant domestic workers who are vulnerable to exploitation, abuse and forced labour. International organizations (IOs) have also been embroiled in employment disputes on the right of access to court where the internal justice system is non-existent or unsatisfactory. I call this the ‘new’ human rights dilemma. Even though the door may be closed (for now) on lifting state immunity for human rights violations on the basis of a *jus cogens* exception, I hold some hope that the employment/commercial exception to immunity might open up possibilities for relief. Some human rights violations may be channelled through the employment or commercial exceptions to immunity.

Framing abuses as employment claims may provide a tool for holding states, diplomats and IOs accountable for human rights violations that occur in the course of employment. It may not help in cases such as *Kazemi* and *Jones* where there is no employment relationship, but it could assist with cases resembling *Jurisdictional Immunities* (mass forced labour) as well as with the numerous cases pending in national courts and IO internal justice systems.

The article proceeds in three parts. First, it examines the principles underpinning this area and proposes a framework for analysing the approach taken by the courts in cases involving states, diplomats and IOs. Second, drawing on an extensive survey of cases on the employment exception to immunity in 20 jurisdictions, it identifies patterns in the practice. Third, it discusses some of the core policy issues that emerge from employment disputes.

<sup>5</sup> *DRC v. FG Hemisphere* [2011] HKCEA 41.

<sup>6</sup> Koh, ‘Transnational Public Law Litigation’, 100 *Yale Law Journal* (1991) 2347.

<sup>7</sup> J. Burke, ‘Saudi Diplomat Accused of Raping Two Maids Uses Immunity to Leave India’, *The Guardian* (17 September 2015); N. Nijar, ‘India Seeks Saudi Cooperation to Investigate Rape Allegations against Envoy’, *New York Times* (10 September 2015).

<sup>8</sup> The Indian Ministry for External Affairs requested a waiver of the diplomat’s immunity, but the Saudi government apparently refused and withdrew their diplomat. I. Bagchi, ‘Gurgaon Rape Case: Saudi Arabia Calls Back Tainted Diplomat’, *Times of India* (16 September 2015).

## 2 Principle

### A *Developing a Framework for Analysing Employment Disputes*

#### 1 *Fox's Three Models for Employment Disputes with States*

Hazel Fox has set out three models to explain the employment exception in law on state immunity.<sup>9</sup> These models do not consider employment disputes between individuals and diplomats or IOs. Under the first model, local courts treat employment contracts as a commercial or private law transaction within the general exception for commercial activity or transactions. This is the model employed by the US Foreign Sovereign Immunities Act and the Canadian State Immunity Act.<sup>10</sup> Under the second model, special categories of employees are identified and subject to special regimes of jurisdiction that regulate their claims, such as diplomats, consul and visiting armed forces. Their claims are usually excluded from the employment contract exception, though there is differing practice on whether the immunity should cover all grades of diplomatic or consular employee. It is often used in combination with the first or third models. The third model provides a special exception for employment contracts separate to the general exception for commercial transactions. This is the model adopted in the 1972 European Convention on State Immunity (ECSI) and the 1978 UK State Immunity Act (SIA) (section 4). More broadly, it has also been the approach of the 2004 United Nations Convention on the Jurisdictional Immunities of States and Their Property (UNCIS) (Article 11).<sup>11</sup>

Fox and I have observed that all three models are deficient in taking account of the diverse factors involved in the employment relationship and the differing classification of the types of work and the types of employees.<sup>12</sup>

#### 2 *Garnett's Multifactorial Analysis*

Richard Garnett has, without reference to Fox's three models, identified some of the diverse factors that may address some of the deficiencies in the models.<sup>13</sup> His analysis does not consider employment disputes between individuals and diplomats or IOs:

- i. context or location of the employment: whether the employee was locally hired;

<sup>9</sup> Fox, 'Employment Contracts as an Exception to State Immunity: Is All Public Service Immune?', 66 *British Yearbook of International Law* (1995) 97, at 98–99. H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2013), at 440–441.

<sup>10</sup> FSIA, *supra* note 4; Canada SIA, *supra* note 4.

<sup>11</sup> United Nations Convention on the Jurisdictional Immunities of States and Their Property (UNCIS), UN Doc. A/RES/59/38 (2005).

<sup>12</sup> Fox and Webb, *supra* note 9, at 441.

<sup>13</sup> Garnett, 'State Immunity in Employment Matters', 46 *International and Comparative Law Quarterly* (ICLQ) (1997) 81.

- ii. status of the employee: immunity may be limited to cases concerning senior employees as they are closer to the sovereign functions of the state;<sup>14</sup>
- iii. the territorial nexus between the forum state and (i) the employee and (ii) the employment contract; and
- iv. the nature of the claim: there is a spectrum in terms of the impact on state sovereignty:
  - a. purely economic claims merely require the court to construe contractual terms or assess the relevant statutory schedule;
  - b. at the other end of the spectrum, disputes about recruitment, reinstatement and renewal require investigation into the conduct and labour practices of the state employer;<sup>15</sup> and
  - c. compensation for unfair dismissal or discrimination lies in the middle: if it is the dismissal of a clerical employee, the investigation of his or her dismissal is not likely to implicate the sovereignty of the state as compared with a senior diplomat.

### 3 An Integrated Framework

By merging Fox's and Garnett's approaches and expanding the actors concerned, an integrated framework for analysing employment disputes may be developed as set out in [Table 1](#).

**Table 1:** Framework for Analysing Employment Disputes

<b>Respondent</b>	<b>Variables</b>
State / embassy	Context of the employment Status of the employee Territorial nexus Nature of the claim
Diplomat	Rights under EU law implicated Incumbent or former diplomat Context of the employment Status of the employee Territorial nexus Nature of the claim
IO/host state	Availability of the IO's internal justice system Quality of the IO's internal justice system Applicability of international/regional obligations Status of the employee Nature of the claim

<sup>14</sup> UNCSI, *supra* note 11, Art. 11(2)(a) provides that immunity bars claims by an employee who 'has been recruited to perform particular functions in the exercise of governmental authority'.

<sup>15</sup> Garnett, 'The Precarious Position of Embassy and Consular Employees in the United Kingdom', 54 *ICLQ* (2005) 705, at 714. See also Garnett, 'State Immunity in Employment Matters', 46 *ICLQ* (1997) 81.

### 3 Practice

This section on practice is based on a mapping exercise covering 175 cases in 20 national jurisdictions and two regional jurisdictions.<sup>16</sup> This involved identifying, analysing and categorizing court decisions on the employment exception to immunity. This task was not straightforward because these cases arise in a range of fora and are not reported in a systematic manner. In addition to searching national case law databases such as the *Oxford Reports on International Law*, I drew on the *International Law Reports*, a detailed analysis of the UK Court of Appeal in the *Benkharbouche* and *Reyes* cases as well as the work of several academic studies.<sup>17</sup> I do not claim to have a comprehensive map of the cases in this area. There are significantly fewer cases against diplomats (12 cases) in the sample as compared to cases brought against the state or an IO. Nonetheless, I believe it is a sufficiently representative sample to identify patterns. Such practice is also important because it consists of judicial decisions, which is a source of international law in Article 38(1)(d) of the ICJ Statute.<sup>18</sup>

Nearly two decades ago, Fox undertook a detailed study of the practice on employment contracts as an exception to state immunity. She observed that there was no uniformity of approach, with the position in international law being obscured by the complexity of the treatment of the exception, the diversity of the application in national jurisdictions and the divergence in theory.<sup>19</sup> I agree that there is no uniformity for the reasons she suggests, although it is possible to identify certain variables that explain trends in the practice.<sup>20</sup>

#### A Individual versus State

Of the 120 cases involving an individual employee suing a state,<sup>21</sup> immunity was set aside in just under half of the cases (54). The trend appears to be moving towards allowing employee claims to proceed where one or more variables are present: the employee is not involved in, or proximate to, the ‘sovereign activities’ of the state; the claim is not based on recruitment, renewal or reinstatement (the three r’s) and the investigation and adjudication of the claim would not interfere with security interests.<sup>22</sup> There is also a distinct trend towards courts setting aside

<sup>16</sup> Australia, Austria, Belgium, Canada, Finland, France, Germany, India, Ireland, Italy, Japan, The Netherlands, New Zealand, Norway, Portugal, USA, United Kingdom (UK), Spain, Sri Lanka and Switzerland. The regional courts are the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).

<sup>17</sup> Fox, *supra* note 9; Garnett *supra* note 13, and the special issue of the 10 *International Organizations Law Review* (2013). *Benkharbouche & Janah v. Embassy of Sudan & Libya*, [2015] EWCA Civ 33; *Reyes v. Al-Malki*, [2015] EWCA Civ 32.

<sup>18</sup> Statute of the International Court of Justice 1945, 1 UNTS 993.

<sup>19</sup> Fox, *supra* note 9, at 98.

<sup>20</sup> See also the recent analysis of mainly European practice conducted by Garnett, ‘State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?’, 64 *ICLQ* (2015) 783.

<sup>21</sup> It may also be an emanation of a state, such as an embassy. Most cases involve employees of embassies or consulates, with a smaller number concerning military bases.

<sup>22</sup> *Benkharbouche*, *supra* note 17, para. 46.

immunity where rights under European Union (EU) law are implicated, which is exemplified by the *Benkharbouche* case discussed below. The ECtHR, with its focus on Article 6(1) of the European Convention on Human Rights (ECHR), has in *Cudak v. Lithuania*, *Sabeh El Leil v. France* and *Wallishauer v. Austria* found the immunity of the foreign state employer to be an undue restriction on that right of access to court.<sup>23</sup>

The express employment contract exception to immunity in the UNCSI and the ECSI, as well as the link to the commercial activity exception in some jurisdictions,<sup>24</sup> strengthens the position of the claimant in such cases.

A key variable is whether the employee has been involved in sovereign activities. Low-level employees such as a cleaner,<sup>25</sup> a driver,<sup>26</sup> and a clerk<sup>27</sup> have been allowed to sue foreign states for employment claims. A US court has observed that a secretary could sue even if her place of employment was 'highly sovereign' – in this case, it was the Brazilian National Superintendency of the Merchant Marine.<sup>28</sup> A switchboard operator who was probably privy to diplomatic conversations was also considered as not performing any governmental functions.<sup>29</sup> A marketing official who had a number of sovereign tasks was also able to sue a Spanish agency because 'he had no role in the creation of government policy or its administration ... he simply carried it out'.<sup>30</sup> There is an outlier case from the Supreme Court of Austria where a high-level employee, the head of the visa section, was entitled to sue his employer on the basis that all contracts of employment entered into by foreign states to be performed in the forum were considered to be private acts.<sup>31</sup> The ECtHR has taken a broad view of what 'low level' means, ruling that immunity should not bar the claim of a head accountant at an embassy who had also been involved in promoting the interests of the Kuwaiti diplomatic service. In the Court's view, he was not employed to perform any governmental functions.<sup>32</sup>

A second and related variable is that the employee's claim does not relate to the 'three r's': recruitment, reinstatement, and renewal. This is codified in Article 11(2)(d) of the UNCSI, which provides that the exception does not apply where 'the subject-matter of the proceeding is the dismissal or termination of employment of an individual

<sup>23</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222. *Cudak v. Lithuania*, Appl. no. 15869, Judgment of 23 March 2010; *Sabeh El Leil v. France*, Appl. no. 34869/05, Judgment of 29 June 2011; *Wallishauer v. Austria*, Appl. no. 156/04, Judgment of 17 July 2012.

<sup>24</sup> E.g., the USA, see *El Hadad v. Embassy of the United Arab Emirates*, 216 F.3d 29 (DC Cir. 2000) (employment of domestic workers is a commercial activity).

<sup>25</sup> *Asha Abdullahi Adan v. Embassy of the Republic of Kenya* (UD2163/2011) (2013) (Irish Employment Appeal Tribunal).

<sup>26</sup> *British Embassy Driver Case*, (1978) 65 ILR 20 (Austria).

<sup>27</sup> *Parravicini v. Commercial Bureau of the People's Republic of Bulgaria* (1969) 65 ILR 282 (Italy). See also *Hungarian People's Republic v. Onori* (1956) 23 ILR 203 (Italy).

<sup>28</sup> *Zveiter v. Brazilian National Superintendency of Merchant Marine*, 833 F. Supp 1089 (1993).

<sup>29</sup> *Cudak*, *supra* note 23.

<sup>30</sup> *Segni v. Commercial Office of Spain*, 835 F.2d 160 (1987) (USA).

<sup>31</sup> *French Consular Employee Claim* (1989) 86 ILR 583.

<sup>32</sup> *Sabeh El Leil v. France*, Appl. no. 34869/05, Judgment of 29 June 2011.

and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State'. The ECtHR held in the *Fogarty* case that questions relating to the recruitment of embassy staff involve sensitive and confidential issues that courts should not review.<sup>33</sup> Nonetheless, there are some cases where courts have allowed claims relating to dismissal or reinstatement to proceed due to the context of employment in an educational institution that was seen as being akin to a private institution.<sup>34</sup> In a recent case, the Italian Corte di Cassazione upheld the immunity of France in relation to a claim for reinstatement brought by the former head of the press office of the Académie de France à Rome (a French public institution). The Court, however, set aside state immunity in relation to the pecuniary claims arising from the alleged wrongful dismissal.<sup>35</sup> This was a significant shift in the case law of Italy, which had previously upheld immunity in wrongful dismissal cases, assuming that an inquiry into the reasons for dismissal would unduly interfere with sovereign matters.

Third, for a court to have jurisdiction over a claim, the investigation and adjudication should not interfere with security interests. As Garnett points out, there is a spectrum in terms of the impact on state sovereignty with the 'three r's' at one end and claims for compensation or contractual interpretation at the other.<sup>36</sup> The most challenging cases are those that lie in the middle, such as discrimination and sexual harassment. In *Cudak*, the ECtHR held that immunity did not bar the claim of a female employee of a Polish embassy who alleged she had been dismissed after sick leave precipitated by sexual harassment committed by a colleague. The Court found that her dismissal did not result from any actions that could potentially threaten to undermine Polish security interests.<sup>37</sup>

Fourth, courts have been more willing to allow claims where there is a territorial connection with the forum state, such as the claimant being a national or permanent resident. In some cases, such claims have been allowed even when they have involved unfair dismissal.<sup>38</sup> Finally, the impact of EU law cannot be underestimated, which is

<sup>33</sup> *Fogarty v. UK*, Appl. no. 37112/97, Judgment of 21 November 2001.

<sup>34</sup> *Neustein v. Republic of Indonesia* (1958) 65 ILR 3 (Austria); *Mallaval v. French Ministry for Foreign Affairs* (1974) 65 ILR 303 (Italy); *Janini v. Kuwait University*, 43 F.3d 1534 (1995) (USA).

<sup>35</sup> *Académie de France à Rome v. Galamini de Recanati, Corte di Cassazione (Szioni Unite Civili)*, 18 September 2014, No. 19674. Cf. a case purely concerning reinstatement where immunity was upheld, *Embassy of Spain to the Holy See v. De la Grana Gonzales, Corte di Cassazione (Szioni Unite Civili)*, 18 April 2014, No. 9034. See also Court of Cassation, All Civil Sections, *Lasaracina v. Embassy of the United Arab Emirates*, Judgment of 27 October 2014, No. 22744 where the court engaged in detailed review as to whether any of the exceptions to the exception in Art. 11(2) UNCIS applied. For analysis of earlier jurisprudence, see Pavoni, 'La jurisprudence italienne sur l'immunité des Etats dans les différends en matière de travail: tendances récentes à la lumière de la Convention des Nations Unies', 53(1) *Annuaire français de droit international* (2007) 211.

<sup>36</sup> Garnett, *supra* note 13.

<sup>37</sup> *Cudak*, *supra* note 234.

<sup>38</sup> *Robinson v. Kuwait Liaison Office* (1997) 145 ALR 68 (Australian gardener at the Kuwait embassy in Australia); *Thomas v. Consulate General of India* [2002] NSWIR Comm 24 (Australian typist at Indian consulate in Australia); *El-Ansari v. Maroc*, Court of Appeal of Quebec, 1 October 2003, CanLII 75274 (QC CA) (Canadian permanent resident at Moroccan consulate in Quebec).



illustrated by the recent *Benkharbouche* judgment of the UK Court of Appeal. In this case, the interaction between sections 4 and 16 of the UK SIA and EU law was critical to the Court's decision.<sup>39</sup>

Under section 4(1) of the UK SIA, a state is not immune in respect of proceedings relating to a contract of employment between a state and an individual where the contract was made in the UK or work is to be wholly or partly performed there. However, this generous exception is narrowed by section 4(2), which provides that an employee cannot bring suit if he or she is a national of a foreign state unless he or she was habitually resident in the UK at the time the contract was made. The remaining rights of embassy employees under the SIA are finally 'eviscerated' in section 16, which excludes from the section 4 claims concerning the 'employment of members of a mission' as defined in the Vienna Convention on Diplomatic Relations (VCDR).<sup>40</sup> Article 1 of this Convention defines a 'member of a mission' to include low-level administrative and technical staff, regardless of nationality.

The Court of Appeal held that section 4(2) of the UK SIA was discriminatory on the grounds of nationality, and the breadth of section 16(1)(a) of the SIA was not required by international law and was not within the range of tenable views of what is required by international law.<sup>41</sup> Moreover, the Court ruled that the claimants' domestic work in the mission did not concern appointment, nor did it fall within functions in the exercise of public powers of the state, nor was it likely to affect the security interest of the state. Consequently, Article 6 of the ECHR could not be read down, and, accordingly, pursuant to section 4(2) of the UK Human Rights Act (HRA), the Court proposed to make a declaration of incompatibility. The Court further held that sections 4(2)(b) and 16(1)(a) of the SIA, in their application to those parts of the claims that fall within the scope of EU law, infringed Article 47 of the Charter of Fundamental Rights of the European Union (CFREU), and, thus, the Court was required to disapply those sections in their application to those parts of the claims, which included claims under the Working Time Regulations, which fall within the scope of EU law.<sup>42</sup>

The finding on EU law was of more practical importance to the case since the violation of Article 47 of the CFREU required the Court to disapply sections 4(2)(b) and 16(1)(a) of the UK SIA, allowing the claimants to bring their EU law claims. The declaration of incompatibility, however, did not affect the operation or validity of the SIA. It acts 'primarily as a signal to Parliament that it needs to consider amending that legislation'.<sup>43</sup> The *Benkharbouche* judgment follows Fox's third model (employment as a special exception) and adds in a non-discrimination element based on EU law. It gives significant weight to the status of the employee and the territorial nexus. It is on appeal to the UK Supreme Court.

<sup>39</sup> *Benkharbouche*, *supra* note 17.

<sup>40</sup> Garnett, *supra* note 13, at 706. Vienna Convention on Diplomatic Relations (VCDR) 1961, 500 UNTS 95.

<sup>41</sup> *Benkharbouche*, *supra* note 17, at paras 64, 53.

<sup>42</sup> OJ 2010 C 83/389. These Regulations implement Council Directive (EC) 93/104 concerning certain aspects of the organization of working time (OJ 1993L 307, at 18) and provisions concerning working time in Council Directive (EC) 94/33/EC on the protection of young people at work (OJ 1994L 216, at 12).

<sup>43</sup> *Benkharbouche*, *supra* note 17, para. 72.

EU law was important from a different perspective in the *Mahamdia* case before the Court of Justice of the European Union (CJEU).<sup>44</sup> This case concerned an unfair dismissal claim brought before German courts by a driver employed by the Algerian embassy. The CJEU held that the embassy was carrying out acts of a private nature in employing the claimant so the dispute fell within Regulation 44/2001 on jurisdiction in civil matters.<sup>45</sup> Although the embassy had public functions, it could still act and acquire rights of a private nature. It also had the sufficient appearance of permanence and a sufficient link with the subject matter of the dispute to fall within Article 18(2) of the Regulation. It was therefore subject to the civil jurisdiction of Germany and could be held accountable for the employment claims.<sup>46</sup>

## B Individual versus Diplomat

Of the 12 cases involving an individual employee suing a diplomat, immunity was set aside in four cases.<sup>47</sup> Two key variables emerge for the setting aside of immunity in these cases. First, and most importantly, where the diplomat has left his or her post due to the termination of functions, retirement or some other reason, he or she only enjoys residual immunity under Article 39(2) of the VCDR.<sup>48</sup> All four cases in which immunity was set aside concerned former diplomats.<sup>49</sup> Courts have interpreted Article 39(2) more narrowly than Article 31, finding that it does not cover acts incidental to the exercise of the diplomat's official functions, which are 'at best' of indirect benefit to the diplomat.<sup>50</sup> Moreover, the risk of interference in foreign relations by exercising jurisdiction over the case is smaller with respect to former, rather than incumbent, officials.<sup>51</sup>

Second, some courts have placed emphasis on the private purposes of the employment. They have noted that there is a 'spectrum of activities' that an employee may perform. A domestic worker who does not perform tasks outside the diplomat's residence may not come within their 'official functions', whereas a personal assistant who deals with correspondence and scheduling may be said to be employed for the

<sup>44</sup> Case C-154/11, *Mahamdia v. People's Republic of Algeria* [2013] ECR I.

<sup>45</sup> Council Regulation 44/2001, OJ 2001L 012.

<sup>46</sup> *Ibid.*, paras 48–49; Rodgers, 'Immunity and the Public/Private Boundary in EU Employment Law', 6 *European Labour Law Journal* (2015) 48, at 58–59.

<sup>47</sup> Immunity was set aside in another case that concerned a consular (rather than diplomatic) official. *Park v. Shin*, 313 F.3d 1138 (9th Cir. 2002). For a study on domestic workers in diplomatic households in Austria, Belgium, France, Germany, Switzerland and the United Kingdom, see A. Kartusch, *Domestic Workers in Diplomats' Households: Rights Violations and Access to Justice in the Context of Diplomatic Immunity* (2011).

<sup>48</sup> 'When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.'

<sup>49</sup> *Baonan v. Baja*, 627 F.Supp.2d 155 (2009); *Swarna v. Al-Awadi*, 622 F.3d 123 (2010); *Abusabib v. Taddese* [2013] ICR 603; *Wokuri v. Kassam* [2012] EWHC 105 (Ch).

<sup>50</sup> *Swarna v. Al-Awadi*, 622 F.3d 123 (2010).

<sup>51</sup> *Ibid.* See also *Baonan*, *supra* note 49; *Abusabib*, *supra* note 49; *Wokuri*, *supra* note 49.

purpose of the diplomat's 'official functions'.<sup>52</sup> Courts will look at whether the person was hired directly by the diplomat and holds a non-diplomatic visa.<sup>53</sup>

Even within this small sample, it is clear that diplomatic immunity remains a stronger bar to employment claims than state immunity.<sup>54</sup> Cases that have been successful in overcoming immunity have been limited to those involving former diplomats. This is confirmed by the recent *Reyes* case in the UK Court of Appeal.<sup>55</sup> The Court held that the activity of employing a person did not fall within the Article 31(1)(c) exception in the VCDR. The employment of domestic servants was incidental to life as a diplomatic agent for which the immunity was granted, and '[t]he fact that an employer derives economic benefit from paying his employee wages that are lower than the market rate does not mean that he is engaging in a commercial activity. Still less does it mean that he is engaging in an activity outside his official functions.'<sup>56</sup> The Court held that the international law obligations in relation to diplomatic immunity are a proportionate and legitimate restriction on the right of access to court and, therefore, not incompatible with Article 6 of the ECHR.<sup>57</sup>

The *Reyes* judgment rejected the argument that employing trafficked workers is a commercial activity (thereby rejecting Fox's first model), and it rejected any implied employment exception to diplomatic immunity (third model). The claimants had adduced evidence that the exploitation of domestic workers is extremely lucrative. The 'fast-growing modern slavery and human trafficking trade' is worth at least US \$32 billion a year and is the 'second or third ... most profitable of all illicit trades'.<sup>58</sup> There are approximately 880,000 people forced to work in slave labour in the EU alone.<sup>59</sup> However, this was not enough to take the employment of such people outside the functions of the diplomat.

### C Individual versus IO or Host State

The practice in relation to employees of IOs can be divided into two categories. First, there are cases where employees sue the IO directly in national courts for breach of

<sup>52</sup> *Abusabib*, *supra* note 49.

<sup>53</sup> *Baonan*, *supra* note 49; *Swarna*, *supra* note 49; *Abusabib*, *supra* note 49.

<sup>54</sup> It remains a strong bar in other areas too. The English Court of Appeal recently held that a Saudi Arabian businessman appointed as the St Lucian representative to the International Maritime Organization could in principle benefit from diplomatic immunity even though he was not qualified for the post and had not attended any meetings. The Court took a formal rather than functional approach to determining the entitlement to immunity, finding that it was not 'necessary or permissible, in determining whether a diplomat or Permanent Representative is in principle entitled to claim immunity, for a court to consider whether that person has "taken up" his post or is fulfilling the requisite functions of the post'. *Al-Juffali v Estrada* [2016] EWCA Civ 176 (2016), para 43. Note, however, immunity was set aside on the basis that he was a UK permanent resident.

<sup>55</sup> *Reyes*, *supra* note 17. The appeal to the Supreme Court is pending.

<sup>56</sup> *Ibid.*, para. 34.

<sup>57</sup> *Ibid.*, para. 76.

<sup>58</sup> Butler-Sloss, Field and Randall, Establishing Britain as a World Leader in the Fight against Modern Slavery, Report of the Modern Slavery Bill Evidence Review, 16 December 2013, at 1, 22.

<sup>59</sup> *Ibid.*

labour laws. Second, employees may sue the host state in regional courts, claiming that the upholding of the IO's immunity in domestic proceedings constitutes a breach of right of access to court. Of the 28 cases surveyed, IO immunity was set aside in only six cases.<sup>60</sup> Immunity remains a strong bar to employment claims, although the ECtHR has made the availability of a robust internal justice system an important variable in such cases.

The leading case on the immunity of IOs in employment disputes is *Waite and Kennedy*, which involved contractors suing the territorial state (Germany) for dismissing their claim regarding an employment contract with the European Space Agency (ESA).<sup>61</sup> The ECtHR invoked the idea that 'a material factor' in determining whether granting the ESA immunity was permissible under the ECHR was whether the applicants 'had available to them reasonable alternative means to protect effectively their rights under the Convention'. What constitutes 'reasonable alternative means'? Is the yardstick national labour law, international law developed for states, the IO's own internal administrative law or the law contained in the headquarters agreement and constituent instrument? How far can a national court inquire into the effectiveness of an IO's internal dispute resolution mechanism without encroaching on its independence? Can a national court, in seeking to comply with state obligations under a regional human rights treaty, require compliance with the same obligations from an IO composed of member states that are not parties to the regional treaty? The IO may have no link with the ECHR other than having signed a headquarters agreement with a contracting party to the convention.

In *Gasparini*, an employee of the North Atlantic Treaty Organization (NATO) brought a case against Italy (state of nationality) and Belgium (host state).<sup>62</sup> The ECtHR found that the NATO appeals panel provided for protection equivalent to the ECHR and did not uphold the claim. It seems that the 'equivalent protection' of IOs need only be comparable, and not identical, to the protections provided in the ECHR.<sup>63</sup> Some Italian and French cases have set aside immunity where no alternative remedy was offered by the IO. For example, a former employee of the African Development Bank (ADB) could not access the administrative tribunal because it was set up after his dismissal and lacked jurisdiction over his claim. The French Cour de Cassation held that the impossibility of access to justice would constitute a denial of justice and that the ADB was not immune.<sup>64</sup>

<sup>60</sup> More cases are analysed in A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (2013). See also Thévenot-Werner, 'The Right of Staff Members to a Tribunal As a Limit to the Jurisdictional Immunity of International Organisations in Europe', in A. Peters *et al.* (eds), *Les Acteurs à L'ère Du Constitutionnalisme Global* (2014) 111.

<sup>61</sup> ECtHR, *Waite and Kennedy v. Germany*, Appl. no. 26083/94, Judgment of 18 February 1999.

<sup>62</sup> ECtHR, *Gasparini v. Italy and Belgium*, Appl. no. 10750/03, Judgment of 12 May 2009.

<sup>63</sup> When states transfer part of their sovereign powers to an organization of which they are members, they are under an obligation to see that the rights guaranteed by the Convention receive within the organization an 'equivalent protection' to that ensured by the Convention's mechanism.

<sup>64</sup> A. Reinisch, *Banque africaine de développement v. M.A. Degboe* (2008).

Unsurprisingly, different domestic courts have been reaching different conclusions. US and UK courts have generally held IOs to be immune in employment disputes.<sup>65</sup> Some French courts along with Italian, Swiss and Belgian courts have assessed IOs' internal justice systems (and generally found them to be adequate). The French Cour de Cassation has assessed compatibility with '*la conception française de l'ordre public international*', whereas the Supreme Courts of Italy and of Switzerland have used Article 6(1) of the ECHR.<sup>66</sup> Some courts, such as in Germany, have been very deferential to the administrative tribunals of IOs.<sup>67</sup> A UK court has found that a right of access to court in the Article 6(1) was not applicable to the UN Educational, Scientific and Cultural Organization, pointing out that it is an IO, founded by an international instrument concluded prior to the ECHR and to which 115 states were parties, a number far in excess of the 47 parties to the ECHR.<sup>68</sup> In Argentina, courts have been more willing to set aside the immunity of IOs if the alternative dispute settlement system is lacking.<sup>69</sup>

## 4 Policy

The above analysis of principle and practice highlights some core policy concerns from the perspective of states and IOs as well as from the perspective of individual claimants.

### A *The Three Models of State Immunity*

This article proposes to frame human rights violations as employment/commercial claims in order to fit within existing exceptions to immunity rather than to try to establish a free-standing human rights exception. This proposal has the advantage of not requiring a new treaty, a protocol to the UNCIS or a major departure from existing practice by courts confronted with such cases. It is an approach grounded in interpretation rather than in reconstruction of the existing legal order.<sup>70</sup> However, how compatible is it with the normative underpinnings of the immunity accorded to states?

Fox and I have explained elsewhere that the basis of state immunity may be explained according to three models.<sup>71</sup> These models are not mutually exclusive, and

<sup>65</sup> *Brzak v. United Nations*, 597 F.3d 107 (2d Cir. 2010); *Bertolucci v. European Bank for Reconstruction and Development* [1997] UKEAT 279.

<sup>66</sup> *L'immunité de juridiction de l'UNESCO*, Cour de cassation, civile, Chambre sociale, 11 February 2009, 07-44.240 (noting also that the UN Educational, Scientific and Cultural Organization (UNESCO) was not a party to the ECHR). Cf. *Pistelli v. European University Institute*, Appeal judgment, No. 20995, Guida al diritto 40 (3/2006), ILDC 297 (IT 2005), 28 October 2005, Supreme Court of Cassation; *Consortium X v. Swiss Federal Govt*, Swiss Federal Supreme Court, 1st Civil Chamber, 2 July 2004, partly published as BGE 130 I 312, ILDC 344.

<sup>67</sup> *Eurocontrol II*, BVerfGE 59, 63 2 BvR 1058/79, 10 November 1981.

<sup>68</sup> *Entico v. UNESCO and Secretary of State for Foreign and Commonwealth Affairs* (2008) EWHC 531 (Comm).

<sup>69</sup> Vinuesa, 'Argentina', in Reinisch, *supra* note 60, 20.

<sup>70</sup> An analogy may be drawn with claims that might be framed as violations of the ECHR being put as violations of the common law for jurisdictional or admissibility reasons.

<sup>71</sup> Fox and Webb, *supra* note 9, at 3–5, ch. 2.

a state may waver between two or more models in its practice. These models can help us to understand the changes in purpose that the plea of state immunity serves. Under the first model (the absolute doctrine), the plea of state immunity acts as a total bar against one state from sitting in judgment on another state. According to this model, a state would be prevented from even addressing an employment-based claim, let alone deciding or enforcing a claim brought in its domestic courts against another state, unless the foreign state consented.

Under the second model (the restrictive doctrine), a distinction is made between acts performed in exercise of sovereign authority that remain immune and acts of a private law or commercial nature in respect of which proceedings in national courts may be brought. The employment contract exception is related to the broader exception for commercial activities or transactions. The second model, which is reflected in the UNCSI, holds the most promise for the proposal in this article. If human rights abuses are framed as falling within the commercial or employment exceptions to immunity, courts may hold perpetrators accountable by applying the existing legal framework.

There are no settled criteria for identifying commercial acts for the purposes of the exception to immunity. There is a debate about whether courts should examine the ‘nature’ or ‘purpose’ of the act to determine its commerciality, with most jurisdictions tending to adopt the ‘nature’ test.<sup>72</sup> This uncertainty about the definition of commerciality can be exploited to bring certain human rights violations within the exception. For example, instead of characterizing Germany’s use of mass forced labour during World War II as a crime against humanity, it could be reframed as commercial activity conducted for profit on a large-scale basis or as a massive breach of fundamental labour rights.

The third model (immunity as a procedural plea) focuses on the technical procedural nature of the plea of immunity. This model draws a procedural/substantive distinction and holds that immunity excludes questions as to the lawfulness of the act of a foreign state. This model is compatible with the proposal in this article because as long as an alleged violation can be brought within the procedural framework of immunity (for example, the commercial exception), the case will not be barred. According to this model, however, the gravity of the alleged violation will have no impact on the court’s determination of its jurisdiction to hear the case. This is unfortunate for situations such as human trafficking where the scale or nature of the abuse may otherwise persuade a court to consider the case.<sup>73</sup>

Most jurisdictions oscillate between the second and third models, both of which are compatible with the proposal in this article. It is therefore only in those few jurisdictions that follow the first model where it would not be possible to channel human rights violations into the commercial or employment exceptions to immunity.

<sup>72</sup> *Ibid.*, ch. 12.

<sup>73</sup> See, e.g., the approach of some US courts to lifting immunity for *jus cogens* violations. Dodge, *supra* note 4.

## B Sovereignty, Security and Nationality Discrimination

As with many disputes involving the law on immunity, the employment cases considered in this article reveal a tension between sovereignty (typified by national security concerns) and the rights of individuals.

Sovereignty and immunity are indelibly connected. As the Institut de droit international has stated, '[i]mmunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States'.<sup>74</sup> Lawsuits may interfere with sovereignty by entailing demands for sensitive information from states regarding internal decision making, consuming the time and energy of state officials, threatening reputational damage and disrupting the effective conduct of international relations. The damage wrought by such suits is increased if the factual threshold for initiating a suit is low, thus opening the way for malicious or frivolous claims.

The manifestation of sovereignty that tends to feature prominently in immunity cases is 'national security'. When codifying the employment contract exception in the UNCSI, the drafters were careful to include the reference in Article 11(2)(d) to the 'security interests' of the employer state. This was 'intended primarily to address matters of national security and the security of diplomatic missions and consular posts'.<sup>75</sup> Although there has been an erosion of state immunity in relation to embassy employees, immunity still tends to be upheld in claims against military establishments. In *USA v. Nolan*, a dispute arose due to the decision of the US military to close a base in the UK. The USA waived its immunity with respect to the collective redundancy procedure with the employees, but the Court observed that immunity would have been granted to allow the USA to avoid any obligation for collective consultation for redundancy under Council Directive 98/59.<sup>76</sup> In the recent *Harrington* case, a UK employment tribunal dismissed claims brought by a former employee of the US Army and Air Force Exchange Services (AAFES) because the provision and maintenance by the USA of an AAFES exchange store at a US military base in the UK was *acte jure imperii* and therefore protected by immunity.<sup>77</sup> A UK court has called the operation of an air force base 'about as imperial an activity as could be imagined'.<sup>78</sup>

While military operations remain sacred, the ability of a state to discriminate on the basis of nationality is under challenge. Distinctions based on nationality arise in different

<sup>74</sup> *Institut de droit international*, Naples Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (Rapporteur: Lady Fox) (2009), Art. II(1).

<sup>75</sup> UNCSI, *supra* note 11, Understanding with Respect to Art. 11.

<sup>76</sup> Case C-583/10, *United States of America v. Christine Nolan*, judgment of 18 October 2012, [2013] 1 CMLR 32, para. 49 (not yet published in the ECR). Council Directive 98/59, OJ 1998 L 225.

<sup>77</sup> *Mr T Harrington v. The United States of America*, Employment Tribunal Judgment, Case 1807940/2013, 27 March 2015. See also *United States v. The Public Service Alliance of Canada* (1992) 94 ILR 264 (civilian staff not allowed to seek union certification because it would involve the court enquiring into hiring practices and policies of a foreign state).

<sup>78</sup> *Littrell v. United States (No. 2)* [1995] 1 WLR 82.

ways. Section 4(2)(b) of the UK SIA, which was found by the UK Court of Appeal to be discriminatory, prevents an employee from bringing suit if, at the time when the contract was made, he or she was neither a national of the UK nor habitually resident there. Article 11(2)(e) of the UNCISL, on the other hand, states that an employee's claim is barred if he or she is a national of the employer state at the time when the proceeding is instituted, unless this person has the permanent residence in the forum state. This provision is also discriminatory on its face, but the Court of Appeal observed that:

the reason for this limitation is rather different from that [for section 4(2)(b) of the UK SIA]. ... The ILC Report on the Draft Articles justified it on the ground that as between the state and its own nationals no other state should claim priority of jurisdiction over claims arising out of contracts of employment, in particular as remedies and access to courts exist in the employer state.<sup>79</sup>

It is true that discrimination in favour of the claimant resolving the dispute in his or her state of nationality has a different functional basis. It prioritizes the link between the state and its national. However, the International Law Commission's reasoning assumes that remedies and access to courts are always open to the claimant in the state of nationality. If the claimants in *Benkharbouche* had been Libyan and Sudanese instead of Moroccan, it would not have increased their access to justice. The prospect of their case being heard in a fair, speedy and effective manner in those countries is very remote.<sup>80</sup> Indeed, the most vulnerable workers are those who are brought from overseas and can only remain in the territory because of their employment status. By leaving an abusive employer in order to bring proceedings, the employee forfeits their right to be present on the territory of the forum state.

Distinctions based on nationality provide unequal conditions of work between employees in the same workplace.<sup>81</sup> One category of worker (habitual residents of the forum state, for example) enjoys access to forum courts, whereas other categories of workers do not. At the same time, a state may decide to only hire its own nationals for its foreign embassy for security reasons.<sup>82</sup> This is an example of nationality discrimination coinciding with sovereignty concerns. If the claims of foreign nationals are related to dismissal or recruitment due to this policy, their claims would be barred by immunity. It is less clear how claims about discrimination would be handled. It would be a matter for the court to determine whether the discrimination was justified because of the security concerns.

### ***C The Narrow Scope of the 'Professional or Commercial Activity' Exception to Diplomatic Immunity***

As observed above, the VCDR, unlike the UNCISL, contains no employment exception. Indeed, there are only three limited exceptions to the immunity of a diplomat from

<sup>79</sup> *Benkharbouche*, *supra* note 17, at para. 64.

<sup>80</sup> See, e.g., International Crisis Group, *Trial by Error: Justice in Post-Qadhafi Libya*, 17 April 2013; African Centre for Justice and Peace Studies, *Sudan's Human Rights Crisis*, June 2014.

<sup>81</sup> Fox, *supra* note 9, at 172.

<sup>82</sup> When Australia decided to employ its own nationals in a foreign embassy, it was sued by a foreign national who was dismissed from his post.



civil proceedings.<sup>83</sup> Claimants have thus tried to fit their employment claims into the exception in Article 31(1)(c): '[A]n action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.' As demonstrated under the section on Practice, this approach has not been successful unless the diplomat's functions have come to an end.<sup>84</sup> Even when a diplomat is implicated in human trafficking – an illegal but undoubtedly commercial enterprise – he has remained immune.<sup>85</sup>

The *Reyes* case is the latest example of courts being reluctant to interfere in diplomatic immunity on the grounds that the official functions of the diplomat require special protection.<sup>86</sup> Diplomatic functions create a 'special vulnerability' for agents in a receiving state, which makes their 'inviolability' a personal (human) right.<sup>87</sup> However, public attitudes are changing, and policy makers may follow. Recently, the USA and India almost came to blows over the mistreatment of a maid/babysitter by a deputy consular official and the subsequent arrest and search for that official. It was front-page news for days.<sup>88</sup> The core issue concerned the search rather than the employment dispute, but it does suggest that the refusal to examine the behaviour of foreign officials is not absolute. The UN Committee on Migrant Workers has stated in General Comment no. 1 that 'States parties should also ensure that migrant domestic workers can obtain legal redress and remedies for violations of their rights by employers who enjoy diplomatic immunity under the Vienna Convention on Diplomatic Relations.'<sup>89</sup>

### D Immunity as a Barrier to Eradicating Modern Slavery?

Cases like *Reyes* uncover the link between human trafficking and employment disputes. The reality is that a subset of victims of human trafficking are exploited by employers who enjoy immunity. Human trafficking is not just about profits and the flow of people across borders. There is serious abuse involved. And domestic servitude is the hardest form to identify and rectify in practice. I would also observe the fact that the claimants in *Reyes* were women, which gives rise to particular vulnerability and particular forms of harm. The Court of Appeal in *Reyes* has stated that the importance of having a domestic servant as an individual diplomat (of whatever seniority) outweighs the harm of one of the worst forms of slavery, including the potential for sexual harassment or even torture.

<sup>83</sup> VCDR, *supra* note 40, Art. 31.

<sup>84</sup> *Ibid.* The exception falls under Art. 39(2) instead of Art. 31(1)(c).

<sup>85</sup> *Reyes*, *supra* note 17.

<sup>86</sup> Rodgers, *supra* note 46, at 40, 49.

<sup>87</sup> *Ibid.*, at 65, citing Langstaff J in the Employment Appeal Tribunal decision in *Al-Malki v. Reyes* [2013] WL 5338237, para. 34.

<sup>88</sup> See 'Arrest of Indian Diplomat in New York Sparks U.S.–India Tensions', *Washington Post*, 17 December 2013, available at [www.washingtonpost.com/world/asia\\_pacific/arrest-of-indian-diplomat-in-new-york-sparks-us-india-tensions/2013/12/17/09d1d81e-6714-11e3-997b-9213b17dac97\\_story.html](http://www.washingtonpost.com/world/asia_pacific/arrest-of-indian-diplomat-in-new-york-sparks-us-india-tensions/2013/12/17/09d1d81e-6714-11e3-997b-9213b17dac97_story.html) (last visited 1 November 2015).

<sup>89</sup> Doc. CMW/C/GC/1, 23 February 2011, para. 49.

In *Reyes*, it is all but admitted that the diplomat was aware of the trafficking and may even have been complicit in it. This is significant in terms of access to justice. It is often impossible to go after the actual trafficker or their network. Moreover, not all states adequately protect migrant workers (trafficked or otherwise), and they may have limited alternative remedial options (in comparison to a normal employee), not to mention a legitimate fear of deportation if they make any complaint at all. It is worth noting that the claimants in both *Benkharbouche* and *Reyes* were locally hired. This is not about the protection afforded to diplomats to bring their own nationals with them, where one could argue there is more of a functional issue at stake and perhaps a duty to seek remedies in the state of nationality, at least as a first step. All of the claimants were domestic staff, cleaners and cooks. It is not seriously contended that their roles implicated national security or sensitive diplomatic issues.

In *Reyes*, the Court of Appeal quoted the *Tabion* decision in the US Court of Appeal for the Fourth Circuit:

[T]here may appear to be some unfairness to the person against whom the invocation occurs. But it must be remembered that the outcome merely reflects choices already made. Policymakers ... have determined that apparent inequity to a private individual is outweighed by the great injury to the public that would arise from permitting suit against [the diplomatic agent].<sup>90</sup>

Ironically, shortly after the *Reyes* decision, the UK Parliament adopted the Modern Slavery Act 2015, hailed as ‘the first of its kind in Europe, and one of the first in the world, to specifically address slavery and trafficking in the 21st century’.<sup>91</sup> The act is completely silent on immunity and would not have changed the outcome of the *Reyes* case.

### ***E Revisiting the ‘Functional Necessity’ Test for IO Immunity***

The rationale for the ‘functional necessity’ test is that IOs need immunity to enable them to fulfil their functions independently, by preventing member states (and, particularly, the host state) from exerting undue influence.<sup>92</sup> From the perspective of employees, the immunity of IOs is beneficial in that it protects the independence of their staff and ensures uniformity in the application of internal rules. However, this immunity does not and should not exempt IOs from respecting human rights norms – these obligations continue to apply, but it is their enforcement that is impeded by immunity.<sup>93</sup> The ‘functional necessity’ justification for immunity has often been interpreted as granting *de facto* absolute immunity to IOs, including in employment disputes.

<sup>90</sup> *Reyes*, *supra* note 17, para. 77.

<sup>91</sup> 2015, c. 30. UK Home Office, Historic Law to End Modern Slavery Passed, Press Release, 26 March 2015.

<sup>92</sup> Committee on Legal Affairs and Human Rights of the COE Parliamentary Assembly, *Accountability of International Organisations for Human Rights Violations*, Doc. 13370, 17 December 2013, at 9.

<sup>93</sup> *Ibid.*

I think the *Benkharbouche* judgment – and the trend in state practice that it represents – signals to IOs that employment disputes may no longer be shielded from scrutiny. The factorial analysis may have a role to play – in particular, the status of the employee and the nature of the claim. There is Dutch case law that holds that IOs are immune in disputes that are ‘immediately connected with the performance of the tasks entrusted to the organization’. In the case of employment disputes, the test is met in relation to staff ‘who play an essential role in the performance of [those] tasks’.<sup>94</sup>

Based on the practice examined above, I would add two further factors to the list: availability and the quality of an alternative mechanism that is applicable to international obligations. Sixty years ago, McKinnon Wood gave three policy reasons why IOs need immunity:

- i. the danger of prejudice or bad faith in national courts;
- ii. the need for protection against baseless actions brought for improper motives; and
- iii. the undesirability of national courts determining the legal effects of the acts of the IO, possibly in contradictory ways.<sup>95</sup>

This reasoning is still invoked today. However, in the past 60 years, there have been radical changes, including the growth of IOs, the nature of their activities and the number of people employed by them; the rise of human rights and the recognition of the individual as a subject of international law and the movement from absolute to restrictive state immunity, which has a knock-on effect on IOs.

What can be done from a policy perspective? First, where an IO’s functions are not hindered by a court ruling, a waiver of immunity by an IO provides a practical solution (see section 4G below). Second, IOs should develop rigorous internal justice systems for employment disputes. Where the internal system falls short, there may be recourse to national courts but with clear guidance on applicable law to avoid fragmentation. There is a concern that different national courts may provide international civil servants with different remedies, claims and types of compensation, and they may demand different forms of evidence and offer diverse procedural rights.<sup>96</sup> August Reinisch argues that recourse to national courts should be a measure of last resort and that the main reasons for doing so would be to create incentives for IOs to implement and improve their internal justice systems.<sup>97</sup>

<sup>94</sup> Henquet, ‘The Jurisdictional Immunity of International Organizations in the Netherlands and the View from Strasbourg’, 10 *International Organizations Law Review (IOLR)* (2013) 538.

<sup>95</sup> Blokker, ‘International Organizations: The Untouchables?’, 10 *IOLR* 259, at 272.

<sup>96</sup> A. Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals’, IIIJ Working Paper 2007/11 (Global Administrative Law Series), at 2, citing *Broadbent v. OAS* 628 F.2d 27, at 35 (DC Cir. 1980).

<sup>97</sup> Reinisch, ‘To What Extent Can and Should National Courts “Fill the Accountability Gap?”’, 10(2) *IOLR* (2014) 572, at 587.

## F *Europe versus the Rest of the World?*

As discussed in the section on Practice, a distinct European approach to employment disputes is emerging. The *Benkharbouche* case in the UK Court of Appeal represents a ‘dramatic extension of the principle of effectiveness of EU law’ and seems to offer potential claimants the chance to enforce directly EU fundamental rights both (i) in spite of state immunity and (ii) against non-EU states.<sup>98</sup> Garnett has observed that ‘the past ten years have witnessed dramatic changes in the European legal landscape with respect to embassy and consular employment’ due to the influence of the ECHR, the Brussels I Regulation and regulations and directives from EU law.<sup>99</sup> He even sees the potential for diplomatic immunity to be disapplied under Article 47 of the CFREU in cases where breaches of EU laws are alleged.<sup>100</sup> That was not the situation in *Reyes*, but it is not a stretch to imagine a case against a diplomat where breaches of EU labour regulations are involved.

Moreover, in the IO context, European host states may find themselves in a ‘Catch-22’: if the host state denies access to courts by upholding the immunity of the IO, the host state violates Article 6 of the ECHR.<sup>101</sup> If the host state does grant access to the court, it potentially violates the provision of the headquarters agreement on recognizing the IO’s immunity. The *Entico* case discussed above illustrates some of these dilemmas.<sup>102</sup> Krieger suggests viewing Article 6 of the ECHR as an obligation to renegotiate the headquarters agreement,<sup>103</sup> but it is more likely that IOs will weigh the risks and perhaps decide to relocate their headquarters outside of Europe. IOs have the ability to set up elsewhere, which is not an option that is open to embassies.

## G *Prospective Waiver as a Solution*

Even if European law has the potential to increase the protection of the rights of employees of states and IOs, it is a solution that is geographically limited and requires expensive and time-consuming litigation to produce results. Another option is for the host state to require a prospective waiver of immunities from states and IOs for gross human rights violations.<sup>104</sup> In the state/diplomatic immunity context, this would entail the host state requiring embassies (and, by extension, their diplomats) to provide a written waiver of immunity. The vast majority of states will not be content to

<sup>98</sup> Rodgers, *supra* note 46, at 63. Sanger observes that this may also lead to an ‘arbitrary distinction’ in the UK between human rights claims that involve EU law where the conflicting domestic law will be disapplied and human rights claims that ‘only’ come within the ECHR, where the remedy would be a declaration of incompatibility with the UK Human Rights Act. Sanger, ‘The State Immunity Act and the Right of Access to a Court’, 73 *Cambridge Law Journal* (2014) 1, at 4.

<sup>99</sup> Council Regulation 44/2001, OJ 2001 L 12. Garnett, ‘State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?’, (2015) 64 *ICLQ* 783, at 785.

<sup>100</sup> *Ibid.*, at 826.

<sup>101</sup> Krieger, ‘Immunität: Entwicklung und Aktualität als Rechtsinstitut’, 46 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2014) 233, at 252–253.

<sup>102</sup> *Entico*, *supra* note 68.

<sup>103</sup> *Ibid.*

<sup>104</sup> I am grateful to Sarah Cleveland for suggesting this idea.

provide a blanket waiver, so, in order to be workable, the waiver should be limited to cases where there are: (i) reasonable grounds for believing that (ii) gross human rights violations have been committed (iii) against a domestic servant. This would capture the most serious cases and provide a best practice model for other jurisdictions to follow, leading to the accretion of state practice.<sup>105</sup>

Such criteria would make it difficult for a state to reject signing up to the waiver. The 'reasonable grounds' test would help eliminate malicious or frivolous suits. These 'reasonable grounds' would be assessed by the police, the judiciary or even the national human rights institution. A more sophisticated model could establish an independent body to evaluate allegations.<sup>106</sup> Limiting the waiver to 'gross human rights violations' would avoid a potential flood of cases based on a minor contractual dispute and would also make it unpalatable for a state to refuse to offer such a waiver. It is one thing not to pay parking tickets and quite another to turn a blind eye to torture and sexual abuse. Finally, the restriction to 'domestic servants' (as compared to, for example, security guards or policy analysts) would assuage concerns about national security being implicated by proceedings. The message would be that states would forfeit their entitlement to employ domestic servants if they could not accept responsibility for treating them properly.

There would no doubt still be resistance from many states who would see this prospective waiver as an encroachment on the inviolability guaranteed by the VCDR. However, it does present a more satisfying solution than what often happens in these situations – recall of the diplomat to the home state – with no further action taken. A prospective waiver is also a less politically charged option than declaring an offending diplomat *persona non grata*.

<sup>105</sup> Interestingly, the UK Home Office has recently considered imposing conditions on diplomats regarding their employees. In the government's response to the key recommendations of the independent review of the overseas domestic worker (ODW) visa (by James Ewins QC, 17 December 2015), the minister of state for immigration said:

We intend that measures to give ODWs working in private households additional protection should also apply to those employed in diplomatic households. The right to change employers will apply to ODWs who have been admitted to work in a diplomatic setting, as will the requirement to attend information, advice and support meetings. In addition, we already require that the entry of such domestic workers must be sponsored by the relevant mission. *UK Visas and Immigration may seek from that mission a waiver of the diplomat's immunity if it wishes to undertake checks on, for example, the diplomat's compliance with UK employment law.*

We will also ensure, as the review has recommended, that where a mission sponsors a private servant of a diplomat under Tier 5 of the Points Based System, one of its sponsorship obligations should be to ensure that the relevant diplomat receives written information about their obligations as employers and confirms they have read and understood it. (Written statement, HCWS583, 7 March 2016; emphasis added)

At the same time, the minister noted that requiring that the relationship of employment be with the diplomatic mission rather than the diplomat would not necessarily make a material difference to the government's ability to check compliance with labour laws because the mission itself would enjoy state immunity.

<sup>106</sup> The features of such an independent body go beyond the scope of this article. Potential models include the UK independent anti-slavery commissioner or a specialist ombudsman.

For IOs, the prospective waiver of immunity can be set out in a protocol to the headquarters agreement. The criteria for a waiver would be broader than those suggested for states. IO-related disputes do not tend to concern gross human rights violations of domestic servants. The majority of disputes concern staff members complaining of discrimination, harassment and contractual breaches. The International Law Association, for example, has recommended that immunity should be waived (i) 'if such a waiver is required by the proper administration of justice' and that (ii) 'situations where such waiver would prejudice the interests of the international organization' should be interpreted restrictively.<sup>107</sup> To reinforce its commitments, an IO may undertake to comply with human rights obligations and waive their immunity by signing up directly to law-making treaties (see the EU's accession to the ECHR).

## 5 Conclusions

The 'frontal attack' on human rights violations through litigation that seeks to establish a human rights exception to state immunity has not succeeded in international, regional and national courts. This article proposes a different approach: to use recognized exceptions to immunity (commercial transactions and employment contracts) to hold perpetrators accountable for their violations of human rights. This 'indirect attack' will not capture all types of human rights violations, but it could prove effective where the violation occurs in a commercial or employment context.<sup>108</sup>

This is an evolving field and a 'new' dilemma for international and domestic lawyers and policy makers, but the above discussion from the perspectives of principle, policy and practice does allow for some general observations. In the realm of state immunity, the three r's – recruitment, reinstatement and renewal – are within the state's discretion, and national courts will be reluctant to pierce immunity to examine claims in this regard. The position of the employee is also important; claims of low-level employees without security roles are more likely to be allowed. There would still have to be some flexibility to allow for the unlikely, though not impossible, scenario of a cleaner going through the rubbish to piece together classified documents or a secretary eavesdropping on secret conversations. European law, particular the CFREU, will have an increasing influence over the scope of immunity.

Diplomatic immunity usually remains a jurisdictional bar to employment claims, however grave the abuses alleged, unless the diplomat only enjoys residual immunity. The employee in these circumstances is better advised to sue the state/embassy, not the diplomat. The de facto absolute immunity of IOs is starting to come under challenge. It is possible that courts will start to scrutinize how the employee's role corresponds to the functions of the IO and will also assess the quality of internal justice systems. IOs

<sup>107</sup> International Law Association, *Accountability of International Organizations: Final Report* (2004), at 228.

<sup>108</sup> Inspiration may be drawn from the indirect attack on the death penalty based on the breach of the notification requirement in Art. 36 of the 1963 Vienna Convention on Consular Relations 1963, 596 UNTS 261, in *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 12.

would be well advised to develop rigorous internal justice systems for employment disputes. Both IOs and states should consider giving a prospective waiver of immunity for employment-related disputes that have a firm factual foundation. States, in particular, may wish to limit this waiver to gross violations of human rights of domestic servants.

This is an area of great complexity, which I have tried to capture in my proposed integrated framework for analysis. We should not lose sight of the fact that immunity – whether of states, diplomats or IOs – is not always opposable to the enjoyment of human rights. Immunity can serve human rights by fostering good international relations and ensuring open communication. Similarly, employment law possesses an interesting duality: it is an element of private law concerned with the regulation of individual contracts and the balance of bargaining power between employers and employees. However, it also has a public function, such as the protection of workers' fundamental rights and a role in supporting the efficient and productive operation of the economy.<sup>109</sup> Employment is not a pure contractual, economic transaction. It is a relationship, one of the most significant relationships in our adult lives. It is also a relationship embedded with power and ripe with the potential for exploitation. In some circumstances, this relationship must be opened up to judicial scrutiny.

<sup>109</sup> Rodgers, *supra* note 46, at 48–49.